SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

against

SAMUEL GOLDBERG,
Respondent.

MEMORANDUM IN BEHALF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

FIRST POINT.

The State Courts erred in permitting plaintiff to recover for the loss of goods of a different character than those described in the Bill of Lading, and for the transportation of which a higher rate is provided in Defendant's filed schedule than is provided for the transportation of goods of the character described.

Adams Express Co. v. *Croninger*, 226 U. S. 491.
C. B. & Q. R. R. Co. v. *Miller* 226 U. S. 513.
C. St. P. M. & O. R. R. v. *Latta* 226 U. S. 519.
Wells-Fargo Co. v. *Neiman-Marcus Co.* 227 U. S. 469.
Kansas City So. Ry. Co. v. *Carl* 227 U. S. 639.

M. K. & T. Ry. Co. v. *Harriman* 227 U. S. 657.
Cramer v. *C. R. I. & P. Ry. Co.* 232 U. S. 490.
Gt. Nor. Ry. Co. v. *O'Connor* 232 U. S. 508.
Boston & Maine R. R. Co. v. *Hooker* 233 U. S. 97.
Pierce v. *Wells-Fargo Co.* 236 U. S. 278.
C. N. O. & T. P. Ry. Co. v. *Rankin* 241 U. S. 319.
N. Y. C. & H. R. R. Co. v. *Beaham* 242 U. S. 148.
Western Transit Co. v. *Leslie* 242 U. S. 448.
D'Utassy v. *Barrett* 219 N. Y. 420.

Although most of the decisions referred to above involve shipments with respect to which the alternative rates of the carrier were based upon value, the principles established in those cases apply to a case like the present where the alternative rates are based upon the character of the property instead of upon its value.

In *Great Northern Ry.* v. *O'Connor. Supra*, this court said:

> "If, on the other hand, there are alternative rates based on value and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in *class* and *value*." (Italics ours.)

In this case the alternative rates of the carrier were based upon the class or nature of the goods which classification is determined by the character and value of the property. Official Classification No. 38 (Defendant's Exhibit "D", page 51) provided for a first-class rate on dry goods, and a double first-class rate on furs.

The first-class rate from New York to Cincinnati was 65c per hundred, and double first-class rate $1.30 per hundred. The rate charged was the first-class.

Under Section 6 of the Interstate Commerce Act defendant is required to file with the Interstate Commerce Commission schedules showing rates, fares and charges for the transportation of all property transported by it. That section further provides that "the schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, *and shall contain the classification of freight in force.*"

The plaintiff is charged with knowledge of the provisions of the classification filed with the Interstate Commerce Commission to the same extent that he would be charged with knowledge of rates based solely on value, and is conclusively presumed to have known that dry goods were classified as first-class for the purposes of fixing the rate for transportation, and furs were classified as double first-class. The agreement entered into between the parties, therefore, consisted of the bill of lading, in which the property is described as dry goods, and the tariffs filed with the Interstate Commerce Commission, specifying the rate to be charged for the transportation of dry goods, and was an agreement on the part of the defendant to transport dry goods and not furs.

The Federal common-law rule prior to the enactment of the Interstate Comerce Act was that a common carrier was not liable for the loss of goods of a different character than those which it had agreed to transport and for the transportation of which it received no compensation. (*Humphreys* v. *Perry*, 148 U. S. 627). In that case it was held that the plaintiff was not entitled to recover for the loss of a trunk of jewelry which he offered to and which was checked by the defendant as

his personal baggage, although he had paid a charge for the excess weight of the property. The ground upon which the carrier was held not liable was because there was no agreement on its part to transport property for the plaintiff except personal baggage, and as the contents of the trunk lost did not consist of the plaintiff's personal baggage there was no liability because there was no agreement to transport that property. In the opinion the court says (page 641):

> "This principle is commented on in Story on Bailments, 9th ed., sec. 565, where is it said 'It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened. And if there is any such fraud or unfair concealment, it will exempt the carrier from responsibility under the contract, or, more properly speaking, it will make the contract a nullity.'"

In *Hart* v. *Pensylvania Railroad Co.*, 112 U. S. 331, 342, the court says (page 342):

> "As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, 'shall lade the same, as freight or baggage, on any vessel without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall

> any such master or owner be liable for any such goods, beyond the value and according to the character thereof so notified and entered.' The principle of this statute is in harmony with the decision at which we have arrived."

The rates established by railroad companies for the transportation of most articles are based on the classification of the property as shown by Official Classification No. 38 (Defendant's Exhibit "D"). A lower rate than that to which the shipper is entitled under the classifications and tariffs of the carrier can as easily be obtained by a shipper by inserting an erroneous description of the character of the property in the bill of lading as by understating its value. The evidence in this case shows that this shipper had made other shipments of furs described as dry goods, and presumably he had obtained the benefit of the lower rate in those cases. His truckman testified that he had received instructions from his employer to describe all shipments received from this firm as dry goods, although it is conceded that they dealt in nothing but furs.

To permit the plaintiff to recover in this case the value of furs when the rate which he was charged was the lower rate applicable to dry goods, would enable him to obtain a preference over other shippers of furs who have correctly described their property in the bill of lading and paid the higher rate applicable to goods of that class, contrary to the provisions of the Interstate Commerce Act.

SECOND POINT.

The State Courts erred in holding defendant was liable because there was no specific provision in the Bill of Lading that it should not be liable if the goods were of a different character than described in the Bill of Lading.

The state courts erroneously treated the case as one which involved an attempt on the part of the defendant to exempt itself from liability imposed upon it by the bill of lading and held defendant liable because it had not provided in the bill of lading that it would not be liable for goods of a different character than those described.

It was unnecessary for the defendant to so provide in the bill of lading because it was entitled to rely upon the description inserted therein by the agent of the shipper. No liability was imposed upon it under the bill of lading for the loss of furs. It did not agree to transport furs. The agreement was to transport dry goods. If its agreement had been one for the transportation of furs it could not have exempted itself from liability for their loss; but not having agreed to transport goods of that character it is not liable for their loss irrespective of the fact that the bill of lading did not provide that defendant should not be liable except in accordance with the provisions of that agreement. In *Kansas City Southern Ry.* v. *Carl*, 227 U. S. 639, it is held that an agreement to release a carrier for part of a loss due to negligence is no more valid than one for a complete exemption, and neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. In the opinion in this case the court says (pages 650-651):

> "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for

part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law."

"The ground upon which such a declared or agreed value is upheld is that of estoppel. Thus in *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 340, 341, it is stated:

" 'As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of *fraud or imposition*, by misrepresenting the *nature or value* of the articles, he destroys his claim to indemnity because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed.' "
(Italics ours.)

In *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508, there was no specific agreement in the bill of lading

exempting the carrier from liability for the loss of property of a higher value than that stated therein. The only provision in the bill of lading in reference to value was the notation, "Released to $10 per cwt." The judgment was reversed because it appeared that the rate paid was the established rate for the transportation of goods when the declared value did not exceed $10 per hundred pounds.

THIRD POINT.

The State Courts erred in holding defendant was liable because the misdescription was non-fraudulent.

The plaintiff's acceptance of the bill of lading precludes him from recovering for goods of a different class than those described, irrespective of whether or not the misdescription was fraudulent.

In *Great Northern Ry. Co.* v. *O'Connor, supra,* the facts were that plaintiff had personal effects weighing 545 pounds and worth $598, which she delivered to a transfer company, which was also a forwarder, to box and ship from Minneapolis to Portland, Oregon. The regular freight rate for such a shipment would have been $3 per cwt., but without express authority from her the company forwarded her goods with others under the terms of a tariff which named $1 as the rate on carload shipments of household goods valued at less than $10 per cwt. Although it apears that there was no fraudulent misstatement by the plaintiff, it was held that she was not entitled to recover in excess of the valuation upon which the freight charges were based; that she was bound by the bill of lading and

her remedy, if any, was against the forwarding company.

In *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, it appears that the consignors kept in their shipping office a book containing blank express receipts. One of these was filled out by their shipping clerk. When the wagon of the express company called at the office the express agent signed the receipt and the package was delivered to him by a boy assistant to the shipping clerk. No questions were asked as to the value of the property, and no value declared other than as shown in the receipt. The clerk who wrapped and marked the package did not know the value of it, and had no actual knowledge of the rates of the express company. The ground upon which the judgment in that case was reversed by this Court is stated in the opinion of Mr. Justice Lurton (page 476) as follows:

> "But the shipper in accepting the receipt reciting that the company 'is not to be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated,' did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between a value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338."

In *Reid* v. *American Exp. Co.*, 241 U. S. 544, the owner of an automobile delivered it to an express company in London to be forwarded to New York, declaring its value to be far in excess of $100. The express

company had it boxed and delivered it to a steamship company, and accepted a bill of lading with a limitation of liability to $100. The property was damaged while being discharged by a stevedore from the ship. It was held that the liability of the steamship company did not exceed $100, that the stevedore was liable for the difference between that amount and the actual value of the property; and in case of failure to recover against the stevedore, the express company was liable to the shipper for the difference because it had accepted a bill of lading in which the value of the property was limited to $100, without authority from the owner.

The bill of lading which was issued by the defendant to the plaintiff in this case is a standard form of straight bill of lading approved by the Interstate Commerce Commission by its order No. 787 of June 27, 1908 (In the matter of Bills of Lading, XIV I. C. C. Reports, p. 346). In that form, a blank space is provided for the description of the articles and special marks, if any. The description of the property was inserted in the bill of lading by the expressman employed by the shipper, and after the property was delivered to the defendant and receipted for by it the shipper accepted the bill of lading containing the description inserted by his expressman. The plaintiff is, therefore, estopped from recovering the value of goods of a different character than those described in the contract of transportation, and upon which the charges were based and his remedy, if any, is against the expressman who misdescribed the contents of the case.

FOURTH POINT.

Error was committed by the Trial Court in admitting oral evidence as to marks on the case, and by the Appellate Courts in giving prevailing effect to the agreement as evidenced by those marks contrary to the written agreement evidenced by the Bill of Lading and filed schedules of the defendant applicable to the transporation of goods of the class described in the Bill of Lading.

It is alleged in the complaint in this action that "in consideration of a reasonable compensation then agreed to be paid to it by the plaintiff *and which compensation was the usual freight rate for dry goods* between New York City and Cincinnati," defendant agreed safely to carry the goods in question to Cincinnati. It would have been unlawful and contrary to the filed tariffs for the defendant, if the goods had been described in the bill of lading as "furs", to have made an agreement to transport them at the lower rate provided in said schedules for the transportation of dry goods.

In *Atchison &c. Ry. Co.* v. *Robinson*, 233 U. S. 173, plaintiff's recovery was based upon an alleged oral agreement made by him with the agent of the defendant for the transportation of livestock. Plaintiff signed and accepted a livestock bill of lading, and the rate which he paid for the transportation of the property was the rate shown in the filed tariffs of the defendant for the transportation of property shipped subject to the terms and conditions of that bill of lading. In the opinion in that case the court says (page 180):

> "We regard these cases as settling the proposition that the shipper as well as the carrier is bound

to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. *Great Northern Ry. Co.* v. *O'Connor, supra.* To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. *Kansas City Southern Ry. Co.* v. *Carl, supra,* p. 652. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

In the present case prevailing effect has been given to the marks on the case over the description of the property in the bill of lading, and the defendant was held liable for the loss of goods of a different character than those which it had agreed to transport, because of the admission over the defendant's objection and exception of evidence that the plaintiff had marked the value and a description of the contents on the case itself.

In *D'Utassy* v. *Barrett, supra* (p. 426), it is said:

"that having obtained a rate based on the declared value the shipper is concluded and there is

no room for parol evidence to show otherwise. (*Mo., K. & T. Ry. Co.* v. *Harriman,* 227 U. S. 657, 670);"

Under the authorities above cited, it is respectfully submitted that inasmuch as the plaintiff obtained a rate based upon the declared character of the property he should not have been permitted to introduce evidence of the marks on the case for the purpose of holding the defendant to a different liability than that evidenced by the bill of lading and filed tariffs.

FIFTH POINT.

The State Courts erred in holding that it was the duty of the defendant under the Bill of Lading to inspect the contents of the case to ascertain whether the goods were correctly described in the Bill of Lading.

In *Wells, Fargo & Co.* v. *Neiman-Marcus Co.,* 227 U. S. 469, the defendant's rules, which were filed with the Interstate Commerce Commission, required that the agent of the express company ask the shipper the value of the property, and insert the value stated, or if no value was stated, stamp the package, "Value asked and not given." This was not done. The State Court affirmed a judgment in favor of the plaintiff, upon the ground that the company's agent had failed to perform a plain duty, and it was in no attitude to complain that the shipper did not state the value. In reversing that judgment this court held that the shipper in accepting the bill of lading represented that the value did not exceed the sum specified therein, that the rate of freight was based upon that valuation and

the liability should not exceed the amount so made the rate basis.

And in the *Great Northern Ry. Co.* v. *O'Connor, supra*, the court says (page 515): "in view of the multitude of transactions it is not necessary that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment."

If a carrier is liable only for the value specified in the bill of lading issued to a shipper when its filed rules require its agent to ask the value of the shipper and insert the value stated in the bill of lading and he fails to do so, this defendant certainly was not required to open and inspect the contents of this case to ascertain whether the description in the bill of lading was correct, even though under the bill of lading it had the right to make such inspection. There is no obligation on the part of a carrier to inspect the contents of all cases of goods which it receives.

> "The volume and methods of the business of transportation by railroads and transportation lines, render it practically impossible in most cases for the carrier to ascertain by examination the contents of packages received for carriage." *Miller* v. *Hannibal & St. Joseph R. R.*, 90 N. Y. 435.

The testimony of defendant's witness Bulger shows that it is not the custom of the defendant to have the contents of cases of goods inspected except where defendant has reason to believe that a particular shipper is misrepresenting the character of property delivered to it for transportation as described in the shipping receipt. The provision in the Bill of Lading merely reserves to the carrier the right to assess correct charges if it discovers by an inspection that the property has been misdescribed but is not an agreement on its part to make such inspection. The duty to correctly describe

the contents of cases is imposed on the shipper by the Statute and the Schedules filed pursuant thereto.

CHARLES C. PAULDING,
Attorney for Petitioner.

WILLIAM MANN,
of counsel.